

seeds having a linolenic acid content of greater than 65~~70~~% relative to the total fatty acid content of said seed.

15. (added) The flax seed of claim 1 wherein the linolenic acid content is between 70%-75%.

16. (added) The flax plant of claim 4 wherein the linolenic acid content is between 70%-75%.

17. (added) The progeny according to claim 7 wherein the linolenic acid content is between 70%-75%.

18. (added) The method according to claim 13 wherein the linolenic acid content is between 70-80%.

19. (added) The method according to claim 13 wherein the linolenic acid content is between 70-75%.

REMARKS:

Claims 3, 6, 7, 8, 9 and 13 were rejected under 35 USC 112 for failing to particularly and distinctly claim the subject matter which applicant regards as the invention. As discussed in greater detail below, a deposit for the strain designated M5791 is being prepared and will be submitted shortly. As soon as a deposit number is available from the seed depository, a voluntary amendment will be filed amending the claims to include this deposit number.

Claim 9 was rejected under 35 USC 112 for using "seeds" and "plants". As the examiner can see, this claim has been amended to refer to "seed" and "plant" as per the examiner's suggestion.

Claim 13 was rejected under 35 USC 112 for the recitation of "descendant". As the examiner can see, this claim has been amended to refer to "descendant" as per the examiner's suggestion.

Claim 3 was rejected under 35 USC 112 for containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor ... had possession of the claimed invention.

As discussed in the accompanying affidavit from the inventor of the above-referenced application, the crosses done to generate M5791 were described in the table inserted between pages 11 and 12 of the application as originally filed, which has been cancelled and re-submitted as Figure 4. It is believed that M5791 is adequately defined based on the fact that the linolenic acid content is shown in Table 5 and 6 and that the flax cultivars used in the crosses are adequately described for one of skill in the art and in view of the amendments to claim 3.

Claims 2, 3, 5-9 and 13 were rejected under 35 USC 112 for containing subject matter which was not described in the specification in such a way as to enable one of skill in the art to make and/or use the invention.

In response, it is hereby stated that a deposit of seed is being prepared and will be submitted in accordance with the Budapest Treaty. During pendency of the application, access will be afforded to the Commissioner upon request. The seeds will be irrevocably and without restriction or condition released to the public upon issuance of a patent. The deposit will be replaced if it should ever become inviable.

Claims 2, 5, 8 and 13 were rejected under 35 USC 112 for not enabling any flax cultivar having greater than 70% linolenic acid.

In response, attached is an affidavit from Edward Kenaschuk, the inventor of the above-referenced application. As discussed therein by Dr. Kenaschuk, the crosses described in Figure 4 produced many other flax lines which also had linolenic acid content above 70% (97-7981 and 97-7741). Furthermore, when these cultivars were crossed with other non-high linolenic acid cultivars, a number of progeny having linolenic acid above 70% were obtained without undue experimentation (shown in the columns labeled 18:3). As

the Examiner can see from reviewing exhibits B, C and D, a significant portion of the progeny had linolenic acid content above 70%. It is therefore held that the inventor was the first to obtain flax cultivars having linolenic acid above 70%, that several cultivars having linolenic acid above 70% were obtained from these crosses and that these cultivars could be crossed with non-high linolenic acid flax cultivars and produce progeny having high linolenic acid which could be selected without undue experimentation. It is further noted that there is considerable precedence for similar claims being allowed in USA, see for example US Patent 6,583,303, US Patent 6,084,157, US Patent 6,270,828, US Patent 5,859,350, US Patent 5,763,745 and US Patent 5,534,425. In view of this, it is respectfully requested that the examiner reconsider this objection.

Claims 1 and 4 were rejected under 35 USC 102(b) in view of PI 524302 and PI 91037 which disclose flax cultivars having at least 65% linolenic acid. As the examiner can see, claims 1 and 4 have been amended to refer to "at least 70% linolenic acid", support for which may be found on page 5, lines 17-19. Claims 2 and 5 have been amended to refer to linolenic acid content between "70-80%", support for which may be found on page 5, lines 19-20. Claims 15 and 16 have been added which refer to "70-75%" linolenic acid content, support for which may be found on page 5, lines 19-20.

Regarding the references submitted by Information Disclosure, it is noted that Tables 1 and 3 of Friedt et al. (Plant Breeding 114: 322-326, 1995) shows flax cultivars with linolenic acid content that do not exceed 66.8% Similarly, Table 2 of Bickert et al., (Arbeitstagung der Arbeitsgemeinschaft der Saatzuchleiter 44: 115-121, 1993) makes reference to the same cultivar having a linolenic acid content of approximately 66.8%. It is held that these references do not constitute prior art in view of the amendments to the claims.

In view of the foregoing, further and more favorable consideration is respectfully requested.

Respectfully submitted

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